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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 LENIER AYERS,

12 Plaintiff,

13  
14 v.

15 HENRI RICHARDS, *et al.*,

16 Defendants.

Case No. C08-5541 RJB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR: January 23, 2009**

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18 This 42 U.S.C. § 1983 civil rights action has been referred to Magistrate Judge Karen L.  
19 Strombom pursuant to 28 U.S.C. § 636(b)(1), Local MJR 3 and 4. Plaintiff was granted leave to  
20 proceed *in forma pauperis*. Dkt. # 3. After reviewing the complaint in this action, the undersigned  
21 recommends that the action be **dismissed with prejudice** prior to service with dismissal counting as a  
22 strike pursuant to 28 U.S.C. § 1915 (g) for failure to state a claim.

23 **DISCUSSION**

24 Mr. Ayers wishes to file a petition for writ of mandamus seeking relief under 28 U.S.C. §  
25 1361. Dkt. # 4. Mr. Ayers requests that the Court order the removal of an employee of the Special  
26 Commitment Center (SCC) because the employee has deliberately subjected him to physical and  
27 emotional abuse. *Id.* Mr. Ayers also claims that his complaints against this staff person have been

1 ignored in violation of his Eighth Amendment and due process rights. *Id.*, p. 6.<sup>1</sup>

## 2 DISCUSSION

3 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*,  
4 745 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a claim, or  
5 contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis*  
6 complaint before service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446,  
7 1448 (9<sup>th</sup> Cir. 1987) (*Citing Franklin v. Murphy*, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).

8 The federal mandamus statute provides that “[t]he district courts shall have original  
9 jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United  
10 States or an agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. Mandamus  
11 is an extraordinary remedy. *Barron v. Reich*, 13 F.3d 1370, 1374 (9<sup>th</sup> Cir. 1994). A writ of  
12 mandamus is appropriately used only when (1) the petitioner’s claim is “clear and certain”; (2) the  
13 respondent official’s duty to act is ministerial and (3) no other adequate remedy is available. *Id.*  
14 (citing *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9<sup>th</sup> Cir. 1986)).

15 Plaintiff relies on *Shea v. Edward*, 581 N.E.2d 822 (1991), an Illinois state case that  
16 involves the Illinois state practice of allowing prisoners to petition for a writ of mandamus  
17 commanding prison officials to retry a disciplinary charge where the prisoner did not receive due  
18 process. *Id.*; *See also, McAtee v. Cowan*, 250 F.3d 506 (7<sup>th</sup> Cir. 2001) (power of Illinois courts to  
19 review prisoner disciplinary proceedings to resolve good time credits for violation of both federal  
20 and state law is well-established). These authorities are neither persuasive nor relevant to the  
21 petition filed by Plaintiff here.

22 In this case, Mr. Ayers filed a petition for a writ of mandamus, seeking to compel the court  
23 to issue an order directing the superintendent of the SCC to relocate an employee, whom Mr. Ayers  
24 claims is abusing him. Dkt. # 4, p. 1. The extraordinary remedy of mandamus is not appropriate to

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26 <sup>1</sup>Plaintiff subsequently filed a second “petition,” and various affidavits and attachments  
27 which vary somewhat from his original filing. These are collectively docketed as “Supplements to  
28 Petition for Writ of Mandamus.” Dkt. # 5.

1 compel the type of relief sought by Mr. Ayers in this lawsuit. The district court does not have  
2 jurisdiction to issue a writ of mandamus to state officers. *Demos v. United States Dist. Court for E.*  
3 *Dist. Of Wash.*, 925 F.2d 1160, 1161 (9<sup>th</sup> Cir. 1991).

4 On November 12, 2008, the Court explained these deficiencies to Mr. Ayers but before it  
5 dismissed his complaint, it provided him with an opportunity to amend his complaint to state a  
6 claim under 42 U.S.C. § 1983. Dkt. # 7. The Court provided specific instructions and guidance for  
7 Mr. Ayers to file his amended complaint. *Id.*, pp. 2 and 3. Mr. Ayers was asked to file an amended  
8 complaint consisting of a short and plain statement showing that he is entitled to relief, alleging  
9 with specificity the names of the persons who caused or personally participated in causing the  
10 alleged deprivation of his constitutional rights, the dates on which the conduct of each defendant  
11 allegedly took place and the specific conduct or action he alleges is unconstitutional. *Id.*, p. 3. The  
12 Court directed the Clerk to provide Mr. Ayers with the appropriate forms needed so that he could  
13 file his amended complaint. *Id.*

14 In response, Mr. Ayers filed three documents. Dkts. # 8, 9 and 10. In the first and third of  
15 these documents, (Dkts. # 8 and 10), Mr. Ayers complains that counsel and the Special  
16 Commitment Center (SCC) must be ordered to provide him with free photocopies so that he can  
17 comply with the Court's order. The Court was previously unpersuaded by a similar argument made  
18 by Mr. Ayers' in Case No. C08-5390 BHS/KLS. (*See Order Denying Plaintiff's Motion for Order*  
19 *Directing Photocopies from SCC.*) Mr. Ayers is allocated 90 photocopies per month at no cost to  
20 him. *See* Dkt. # 60, ¶ 3, Case No. C08-5390 BHS/KLS.

21 In Dkt. # 9, Plaintiff cites generally to the Eighth Amendment as grounds for not dismissing  
22 his case, but then argues that his "only adequate remedy available is served in the filing of this writ  
23 of mandamus." Dkt. # 9, p. 3. Plaintiff maintains that his claims are "clear and certain" and that  
24 the "simple mandamus remedy" . . . "and not a lawsuit," is in fact appropriate in this case.

25 It does not appear this defect can be cured and dismissal prior to service is therefore  
26 appropriate. *Franklin v. State of Oregon, State Welfare Division*, 662 F.2d 1337 (9<sup>th</sup> Cir. 1981).

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## CONCLUSION

The action should be **DISMISSED WITH PREJUDICE**. Dismissal for failure state a claim counts as a strike pursuant to 28 U.S.C. 1915 (g). A proposed order accompanies this report and recommendation.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **January 23, 2009**, as noted in the caption.

Dated this 31st day of December, 2008.



Karen L. Strombom  
United States Magistrate Judge